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9 **UNITED STATES DISTRICT COURT**
DISTRICT OF ARIZONA

10 **United States of America,**
11 **Plaintiffs,**
12 **v.**
13 **Brent Myers,**
14 **Defendant(s).**

CR-20-00588-TUC-JCH
GOVERNMENT’S REPONSE TO
DEFENDANT’S OBJECTIONS TO
THE GUIDELINE
CALCULATIONS IN THE PRE-
SENTENCE REPORT

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16 Plaintiff, the United States of America, by and through its attorneys respectfully
17 submits its response to the defendant’s objection to the guideline calculations in the pre-
18 sentence report. The sentencing hearing is currently scheduled for August 24, 2021.

19 **A. BACKGROUND AND FACTS¹**

20 Immigration and Customs Enforcement (ICE), Homeland Security Investigations
21 (HSI) special agents from Tucson developed information that the several internet protocol
22 (IP) addresses assigned to the defendant and his wife had been identified as potential
23 download candidates for sharing child pornography files on the eMule/ED2K peer-to-peer
24 (P2P) file-sharing network. The IP addressed assigned to the defendant’s computer
25 changed several times. Between July 2016 and February 2018, investigative software
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28 ¹ For purposes of the government’s objection, the government incorporates the statements of the
offenses contained in the PSR as well as the additional facts provided here.

1 established direct connections to the computers using the IP addresses on multiple
2 occasions and obtained partial downloads. On February 19, 2018, agents with HIS
3 downloaded a partial file named “(Pthc) Sex With The 10-Year Girl (, Children, Girls,
4 Youngsters).avi” This is a video file that depicts a prepubescent girl who appears to be
5 approximately 9 to 11 years old. The video begins with the girl posing in her underwear
6 (she is topless). During the downloaded portion of the video, the girl rubs her buttocks and
7 pubic area with her hands under her underwear, and the camera zooms in on those areas
8 as she does this. The downloaded portion of the video then cuts to show the girl lying nude
9 on a bed. While there, the girl spreads her legs open and rubs her body (including her pubic
10 area) with her hand, and the camera zooms in on her pubic area as she rubs that part of her
11 body. Two other brief clips appear later in the downloaded portion of the video that appear
12 to depict an adult male rubbing his penis on the girl’s pubic area and/or anus.

13 During his recorded interview with HSI, the defendant was asked if he was aware
14 that eMule shared the contents of the eMule download folder with other users, and the
15 defendant stated that he was. The defendant also told agents that he moved music files out
16 of the eMule download folder and deleted the child-pornography files from within the
17 eMule download folder, to prevent those files from being shared with other users. When
18 asked if he had ever changed any of the eMule settings in an attempt to limit the sharing
19 that he did with other users, and he advised that he had. The defendant told agents that he
20 would “turn off the, um, shared folders” and “limit the speed at which it, um, shares, uh,
21 data”.

22 On May 19, 2021, the draft pre-sentence report was released. The report calculated
23 a base offense level under the advisory Sentencing Guidelines of 18, U.S.S.G.
24 § 2G2.2(a)(1), and applied upward adjustments totaling 15 levels under § 2G2.2(b)(2) (+2
25 for depictions of pre-pubescent minors), § 2G2.2(b)(3)(F) (+2 for offense involving
26 distribution of child pornography), § 2G2.2(b)(4) (+4 for depictions of sadistic and
27 masochistic conduct), § 2G2.2(b)(6) (+2 for use of a computer), and § 2G2.2(b)(7)(D) (+5
28 for more than 600 images of child pornography) for an adjusted offense level of 33. (PSR

¶¶ 49-58.) The report also applied a three-level reduction in defendant's offense level, pursuant to U.S.S.G. § 3E1.1, for a total offense level of 30. (PSR ¶¶ 60-62.)

On June 2, 2021, the defendant filed an objection to the +2 enhancement for distribution, arguing that although the defendant knew and understood how the peer-to-peer file sharing program eMule works, he did not knowingly distribute images and videos of child sex abuse material because he took steps to reduce the possibility of his distributing these files.

II. LAW AND ARGUMENT

The preponderance of evidence standard is generally the appropriate standard for factual findings used for sentencing. *United States v. Dare*, 425 F.3d 634, 642 (9th Cir. 2005); *United States v. Restrepo*, 946 F.2d 654, 661 (9th Cir. 1991) (en banc) (“[A]s a general rule . . . , due process does not require a higher standard of proof than preponderance of the evidence to protect a convicted defendant's liberty interest in the accurate application of the Guidelines.”).

As noted above, U.S.S.G. § 2G2.2 is the relevant sentencing guideline for the defendant's offense. This provision also contains various specific offense characteristics applicable to child pornography offenses. Relevant to this objection, U.S.S.G. § 2G2.2(b)(3) states:

(3) (Apply the greatest) If the offense involved:

(A) Distribution for pecuniary gain, increase by the number of levels from the table in § 2B1.1 (Theft, Property Destruction, and Fraud) corresponding to the retail value of the material, but by not less than 5 levels.

(B) Distribution for the receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain, increase by 5 levels.

(C) Distribution to a minor, increase by 5 levels.

(D) Distribution to a minor that was intended to persuade, induce, entice, or coerce the minor to engage in any illegal activity, other

1 than illegal activity covered under subdivision (E), increase by 6
2 levels.

3 (E) Distribution to a minor that was intended to persuade, induce,
4 entice, coerce, or facilitate the travel of, the minor to engage in
5 prohibited sexual conduct, increase by 7 levels.

6 (F) Distribution other than distribution described in subdivisions
7 (A) through (E), increase by 2 levels.

8 Under the child pornography sentencing guidelines, “distribution” can be found
9 when the defendant knowingly “used a file-sharing program to download child
10 pornography that, whether knowingly or unknowingly, allowed others access to those
11 files.” *United States v. Vallejos*, 742 F.3d 902, 908 (9th Cir. 2014). “[E]vidence of a
12 deliberate, affirmative action of delivery” is not required to sustain a conviction for
13 distribution of child pornography under 18 U.S.C. § 2252(a)(2). *United States v. Budziak*,
14 697 F.3d 1105, 1108–09 (9th Cir.2012).

15 Although the defendant relies on *Vallejos*, the decision does not support his
16 position. The Ninth Circuit in *Vallejos* upheld the 2-level sentencing enhancement based
17 on the fact that Vallejos:

18 understood how LimeWire operated. He testified at trial that he initially
19 downloaded the file-sharing program “for music” but that he “came across”
20 child pornography while using LimeWire to view adult pornography. He
21 said that child pornography “piqued his interest” and that he began to “copy
22 information from child pornography files ... and use information in those
23 titles to search for other files.” He testified about the search terms he used
24 to “get more child pornography,” and he explained that he generally deleted
25 images after viewing them.

26 These facts are virtually identical to those present here. The defendant understood
27 how eMule worked, he used the program to download music (and child sex abuse material)
28 and he deleted the images after viewing them. (PSR ¶¶ 22-25.) The fact that he
unsuccessfully took steps to reduce the frequency with which he distributed the child sex

1 abuse material only supports the government's argument that he was knowingly making
2 the files available for download by others, albeit at a slower speed.

3 Wherefore, the United States respectfully requests that this Court impose a two-
4 level specific offense characteristic for distribution of child sex abuse material and
5 overrules the defendant's objections to the guideline calculations in the pre-sentence
6 report.

7 **RESPECTFULLY SUBMITTED** on this 10th day of June, 2021.

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9 GLENN B. McCORMICK
10 Acting United States Attorney
11 District of Arizona

12 *s/ Erica L. Seger*

13 Erica L. Seger
14 Assistant United States Attorney

15 Copy of the foregoing served electronically or by
16 other means this 10th day of June, 2021, to:

17 All ECF participants
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